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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

GEORGE R. DEMPSTER and FRANCES S. DEMPSTER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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GEORGE R. DEMPSTER and FRANCES S. DEMPSTER,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioners, George R. Dempster and wife, Frances S. Dempster, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit which reversed a judgment in favor of the petitioners, rendered by the United States District Court for the Eastern District of Tennessee.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court (R. 12a-19a), which is printed in Appendix B hereto, infra, p. 23, is reported in 162 F. Supp. 585. The opinion of the Circuit Court of Appeals, printed in Appendix B, infra, page 28, is reported in .... F. 2d .... The opinion in **Tobin v. United States**, decided by the Fifth Circuit Court of Appeals on March 25, 1959, which the Sixth Circuit Court of Appeals followed and adopted is printed in Appendix B, infra, p. 32, and is reported in 264 F. (2d) 845.

JURISDICTION.

The decision of the Sixth Circuit Court of Appeals was rendered on April 29, 1959, and the judgment thereon which was entered on the same date is printed in Appendix B hereto, infra, p. 35. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

The question presented by this petition is:

Were petitioners' refund claims filed on September 11, 1956 (after enactment by the Congress on June 29, 1956, of Public Law 629, Section 1, providing for the taxing of proceeds received from the transfer of patents as capital gains, applicable to "any taxable year beginning after May 31, 1950") for 1951 and 1952 federal income taxes paid on such proceeds as ordinary income, as required by the regulations then in force, untimely by reason of the three-year period provided by Section 322 (b) (1) of the 1939 Internal Revenue Code for filing claim for "overpayment" of income taxes.

STATUTES INVOLVED.

(1) The statutory provisions involved are:

(a) Public Law 629, c. 464, Section 1, 70 Stat. 404, enacted June 29, 1956 (26 U. S. C., Appendix, 1952 ed., Supp. IV, Sec. 117), printed in Appendix A, infra, p. 13.

(b) Section 322 (b) (1) of the 1939 Internal Revenue Code (26 U. S. C., 1952 ed., Sec. 322), printed in Appendix A, infra, p. 14.

(2) The legislative history of Public Law 629, Section 1, is that:

Prior to the enactment of Section 1235 of the 1954 Revenue Code (providing for the taxing of proceeds from the sale or licensing of patents as capital gains), there were no special statutory provisions providing the method of taxing this type income. By regulations, the Commissioner of Internal Revenue (herein called "Commissioner") had vacillated in his position in reference thereto, by taxing such proceeds as capital gains during some periods and as ordinary income during other periods.

In 1946, the U. S. Tax Court in **Edward C. Myers v. Commissioner**, 6 T. C. 258, held such payments were taxable as capital gains. The Commissioner acquiesced in that holding (Internal Revenue Bulletin No. 12, June 17, 1946, 46-1 C. B. 3) and continued to do so until March 20, 1950, when he issued Mim. 6490, C. B. 1950-9 (printed in Appendix A hereto, infra, p. 14), withdrawing his acquiescence and providing for the taxing of such proceeds as ordinary income, effective as to taxable years beginning after May 31, 1950. Even after the enactment of the 1954 Revenue Code, the Commissioner refused to withdraw Mim. 6490, and continued to tax such payments as ordinary

income as to the taxable years beginning after May 31, 1950, and before January 1, 1954 (Rev. Rul. 55-58, printed in Appendix A, infra, p. 16).

Thus, there existed the anomalous situation that such payments were taxable as income derived from the sale of a capital asset, as to years beginning before May 31, 1950, and those beginning after the effective date of the 1954 Revenue Code; but if received in the intervening years they were taxable as ordinary income, even though derived from the same transfer. To correct this situation Section 1 of Public Law 629 was enacted. (**Philbrick v. Commissioner**, 27 T. C. 346, and **Rollman et al. v. Commissioner**, 244 F. [2d] 634.)

On May 10, 1955, a bill was introduced in the House of Representatives (H. R. 6143, printed in Appendix A, infra, p. 18) to amend Sec. 117 of the 1939 Revenue Code, by adding thereto a new sub-section designated "(q) **Transfer of Patent Rights**", and the language thereof was and is identical with Section 1 of Public Law 629.

The House Ways and Means Committee, on July 30, 1955, in unanimously reporting H. R. 6143 for passage, issued Report No. 1607, the material portions of which are printed in Appendix A, infra, p. 20.

After H. R. 6143 was passed in the House and while being considered by the Senate Finance Committee, amendments were added which were applicable to the 1939 and 1954 Revenue Codes, other than said Section 117. On May 1, 1956, said Committee issued Report No. 1941, and as to Section 1 of Public Law 629, this Report is the same as No. 1607, with the exception of the first paragraph which reads:

> "Section 1 of this bill, which was adopted by your committee without amendment, makes applicable the

special rules providing capital-gains treatment for sales or exchanges of patents in section 1235 of the Internal Revenue Code of 1954 to taxable years beginning after May 31, 1950, by amending the Internal Revenue Code of 1939."

From these reports and the plain language of said Section 1, it is manifest that Congress intended this type income to be taxed as capital gains, retroactive to "any taxable year beginning after May 31, 1950", so as to coincide in time with the effective date of Mim. 6490, and thus remedy the wrong resulting from its enforcement.

STATEMENT.

This case now concerns income tax refunds for 1951 and 1952, aggregating $41,702, plus statutory interest. The jurisdiction of the District Court was invoked since a federal statute was involved, and also by virtue of Title 28, U. S. C., Sections 1346 (a) (1) and 1402 (a).

After the enactment of Public Law 629, petitioners filed their refund claims on September 11, 1956, for the years 1951, 1952 and 1953. Said claims were denied on July 9, 1957, and petitioners instituted this suit on August 23, 1957. In the complaint it is alleged that the taxes were erroneously, wrongfully and illegally assessed and collected by reason of the enactment of Public Law 629 (R. 4a-6a). The government specifically denied this allegation in its answer (R. 7a), the legal effect thereof being to concede that the taxes were legally and lawfully assessed at the times of payment. As to the claims for 1951 and 1952, the government affirmatively plead Section 322 (b) (1) of the 1939 Revenue Code (R. 7a-8a).

Subsequently, the government filed a motion to dismiss as to the years 1951 and 1952 (R. 1b), relying upon said

Section 322 (b) (1), and on pre-trial, admitted liability for the 1953 claim (R. 8a-10a) which it later paid, hence the refund for that year was not involved in the Court of Appeals.

The petitioners moved for summary judgment, and the District Court in sustaining it, and in overruling the government's motion to dismiss, concluded that the taxes, when paid, were not overpayments, nor illegal, nor wrongfully assessed or collected; that by reason of Section 1 of Public Law 629, a right of action accrued to the petitioners for their recovery; that only the general six year limitation period of 28 U. S. C., Section 2401 (a), was applicable, and since petitioners' suit was filed well within that period, they were entitled to recover (R. 18a-19a).

The judgment entered on the District Court's opinion provided for statutory interest from June 29, 1956 (R. 19a-20a), and not from the dates the taxes were paid, the government contending that interest accrued only from and after the enactment of Public Law 629. In support of this position, the government relied upon Section 3771 of the 1939 Revenue Code [Section 6611 (b) of the 1954 Code] providing that as to tax refunds, interest shall commence to run from the date of "overpayment".

Contrary to the denials in its answer that the taxes were not illegally and unlawfully assessed and collected, and the position which it took respecting the time when the overpayments occurred, the government, on appeal, although admitting that Mim. 6490 was being enforced when the taxes were paid, contended that since some courts had held this type of income to be taxable as capital gains, the petitioners' tax payments for 1951 and 1952 were erroneous, illegal, and overpayments when made, and hence the refund claims were barred by said Section 322 (b) (1). This contention was directly opposite to the

government's position asserted in Rev. Rul. 55-58 (Appendix A, infra, p. 16), wherein it unequivocally refused to follow those decisions and instead stated it would follow the decisions in **Bloch v. United States**, 200 F. (2d) 63, cert. den. 345 U. S. 935, and **Broderick v. Neale**, 201 F. (2d) 621, which supported Mim. 6490.

The Court of Appeals, composed of one Circuit Judge and two District Judges, one being from the Fifth Circuit, reversed the District Court and dismissed petitioners' suit, upon the holding of the Fifth Circuit Court of Appeals in **Tobin v. United States**, supra.

REASONS FOR GRANTING THE WRIT.

(1) The decisions of the Courts of Appeal in this case and in **Tobin v. United States**, 264 F. (2d) 845 (Appendix B, infra, p. 32), upon which the instant case was decided, are in direct conflict with and indistinguishable from the decisions of the Second Circuit Court of Appeals in **Hollander v. United States**, 248 F. (2d) 247, which conflict was recognized by the court and conceded by the government in the **Tobin** case, and the decisions of the United States Court of Claims in **Verckler, Exec., v. United States**, 170 F. Supp. 802 (Appendix B, infra, p. 36); **Siegel et al. v. United States**, 18 F. Supp. 771; **Detroit Trust Co. v. United States**, 18 F. Supp. 776, and **Morgan et al. v. United States**, 18 F. Supp. 1017.

(2) The Court in the **Tobin** case, in adopting the government's theory that Public Law 629, Section 1, did not create any new right, but was merely declaratory of the right, which had been settled by the case law, to have such proceeds taxed as capital gains, cited and relied upon several court decisions, including those that the government in Rev. Rul. 55-58 expressly refused to follow, one of which

was **Allen v. Werner**, 190 F. (2d) 840, decided by the Fifth Circuit Court of Appeals. This holding in the **Tobin** case and its adoption by the Court of Appeals in the instant case directly conflicts with the holding in **Bloch v. United States**, supra, and **Broderick v. Neale**, supra, which conflict was recognized by the government in Rev. Rul. 55-58. In the **Bloch** case the court said:

> "We are aware of the fact that royalties resulting from a transfer of a patent were apparently held to be payments of the purchase price in Allen v. Werner, 5 Cir., 190 F. 2d 840, and Commissioner of Int. Rev. v. Celanese Corp., 78 U. S. App. D. C. 292, 140 F. 2d 339, but we have not acceded to this view in our decisions, discussed above, and we see no sufficient reason for holding that payments of a percentage of future earnings of a patent should be treated as falling outside the scope of Sec. 211 (a). So far as the decisions of the Court of Appeals for the Fifth and District of Columbia Circuits and the Tax Court, Kimble Glass Co. v. Commissioner, 9 T. C. 183; cf. Myers v. Commissioner, 6 T. C. 258, are to the contrary we respectfully differ with their conclusions" (66).

(3) The interpretation which the Court of Appeals placed upon Section 1 of Public Law 629 is in direct conflict with the decisions of this Court governing the construction of statutes in the following respects:

(a) A statute is to be interpreted not only from its express language, but also with the view of effectuating its purpose of overcoming the wrong to which it is directed and affording a remedy therefor. In doing so it is proper to consider the object which the Congress sought to accomplish and the reasons for and the circumstances leading to its enactment. Any construction which impairs, nullifies or defeats the congressional purpose or intent

must be avoided (**Helvering v. Hammel**, 311 U. S. 504; **Gooch v. United States**, 297 U. S. 124; **Trotter v. Tennessee**, 290 U. S. 354).

(b) A statute is not to be construed in such manner as to render it ineffective or inefficient or to cause public injury (**United States v. Powers**, 307 U. S. 214).

(c) Taxation is a practical matter and laws in respect thereof should be given a common sense interpretation and construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences (**Farmers Loan Co. v. Minnesota**, 280 U. S. 204; **Colgate-Palmolive-Peet Co. v. United States**, 320 U. S. 422).

(d) Taxing statutes are to be construed liberally in favor of the taxpayer and in harmony with the legislative intent, so as to enforce and carry out the intended relief (**Foster v. United States**, 303 U. S. 118; **Bowers v. N. Y. & Albany Co.**, 273 U. S. 346) and even if the language thereof is doubtful, the doubt must be resolved against the government and in favor of the taxpayer (**United States v. Merriam**, 263 U. S. 179).

(e) A statute speaks just as plainly by inference as in any other manner, and that which is implied by its terms is as much a part thereof and is as effectual as that which is expressed (**Luria v. United States**, 231 U. S. 9).

(f) A statute confers by implication all powers necessary for the exercise thereof (**South Carolina v. United States**, 199 U. S. 437).

(g) A desire for equality among taxpayers, rather than the reverse, is to be attributable to the Congress (**Colgate-Palmolive-Peet Co. v. United States**, supra).

(4) The failure of the Court of Appeals to hold that the three year period provided by Section 322 (b) (1) of the

1939 Revenue Code did not begin to run until the right to the refund came into existence on June 29, 1956, by virtue of the retroactive provisions of Section 1 of Public Law 629, directly conflicts with and is contrary to **Rosenman v. United States**, 323 U. S. 658; **Roles v. Earle**, 195 F. (2d) 346, cert. den. 344 U. S. 810; **United States v. Dubuque Packing Co.**, 233 F. (2d) 453; **Verckler, Exec., v. United States**, supra, and **Hollander v. United States**, supra.

(5) An action for the recovery of taxes is equitable in nature and is to be controlled by equitable principles (**Stone et al. v. White**, 301 U. S. 532). When the taxes sought to be recovered herein were paid, they were lawful payments and were not overpayments, nor were they erroneous and illegal collections, just as the District Court held. It is inequitable to permit the government to unjustly enrich itself by now asserting otherwise and to claim that the "case law" established the right of the petitioners to the refunds prior to the enactment of Public Law 629, especially so in view of the exact contrary position asserted by the government in Rev. Rul. 55-58. Therefore, by its actions and by reason of circumstances of its own making, upon which these petitioners relied in paying said taxes, the Court of Appeals should have held that the government by its own conduct and inconsistent positions is estopped to rely upon the defense of the statute of limitations. The decision of the Court of Appeals, therefore, conflicts with **Stone et al. v. White**, supra, which held that where equitable reasons are involved, a statute of limitations will not operate as a bar, so long as the action is otherwise timely, and in the instant proceeding the action was timely, ante, pp. 5-7.

(6) The question here presented is of extreme importance to all taxpayers, as well as in the administration of the internal revenue laws. The identical question is pres-

ently at issue in several pending cases and similar questions will arise in the future just as they have in the past. Therefore, settlement of the law on the subject which has not heretofore been before this Court is clearly within and will promote the public interest.

(7) The decision of the Court of Appeals is erroneous since it fails to give effect to the clear congressional mandate as expressed in Section 1 of Public Law 629, and the two Congressional Committee Reports. When said Section 1 was enacted, the three year period of Section 322 (b) (1) had already run as to the taxable years 1951 and 1952. This fact was fully known by the Congress, and for this reason the law was made applicable to "any taxable year beginning after May 31, 1950."

Also, said holding by the Court of Appeals permits the government to take advantage of circumstances of its own making, which required the petitioners to pay taxes on said proceeds as ordinary income, and now escape making restitution by upholding the government in its inconsistent position that said proceeds were taxable as capital gains during each of said years. Such conduct on the part of the government should not be judicially approved and condoned since it is contrary to and violates all rudiments of fair play and tends to destroy public confidence in the integrity of our government. The holding by the Fifth Circuit in the **Tobin** case, which was adopted by the Court of Appeals in this case, is even in conflict with other decisions of the Fifth Circuit, namely, **Allen v. South Atlantic S. S. Co.**, 177 F. (2d) 257, wherein said Court in overruling the government's plea of the statute of limitations in a tax refund suit held that "unless the mandate of the enactment inexorably requires such a construction, it would be manifestly unjust and inequitable to permit the government to retain this tax," and its holding in **United States v. Moor**,

93 F. (2d) 422, cert. den. 303 U. S. 663, that it would be unfair to relieve those taxpayers who had not paid and deny relief to those who had paid.

CONCLUSION.

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES D. SNEPP,
W. CECIL ANDERSON,
Counsel for Petitioners.

APPENDIX A.

Statutes Involved.

(a) Public Law 629, c. 464, Sec. 1, 70 Stat. 404, enacted June 29, 1956:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 117 of the Internal Revenue Code of 1939 (relating to capital gains and losses) is hereby amended by adding at the end thereof a new subsection as follows:

"(q). **Transfer of Patent Rights.**—

"(1) **General Rule.**—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(B) contingent on the productivity, use, or disposition of the property transferred.

* * * * * * *

"(4) **Applicability.**—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred."

(26 U. S. C. Appendix 1952 ed., Supp. IV, Sec. 117.)

(b) 26 U. S. C., 1952 ed., Section 322:

"Supplement O—Overpayments."

* * * * * * * * *

Sec. 322. **Refunds and Credits.**

* * * * * * * *

(b) **Limitation on Allowance.—**

(1) **Period of Limitation.**—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * * * * *

Mim. 6490—March 20, 1950.

Sales of patents: Tax Status of "royalty" payments.

1. The Tax Court of the United States held in Edward C. Myers v. Commissioner (6 T. C. 258), that under the terms of the exclusive license agreement between the petitioner and the B. F. Goodrich Rubber Company the petitioner sold his invention to Goodrich. The Commissioner's acquiescence in the Myers decision was published in Internal Revenue Bulletin No. 12 dated June 17, 1946 (46-1 C. B. 3).

2. Further consideration has been given to the question as to whether the decision in the Myers case should be

accepted as a precedent in the determination of income tax liabilities of other taxpayers with respect to contracts containing essentially the same provisions.

3. The exclusive license agreement considered in the Myers case provided, among other things, that the licensor is to receive from the licensee in return for the exclusive right to manufacture, use, and sell the patented article annual payments equal to 5% of the selling price of the articles manufactured and sold, such annual payments, however, not to be less than a specified minimum annual amount.

4. The Bureau has reached the conclusion that where the owner of a patent enters into an agreement whereby, in consideration of the assignment of the patent, or the license of the exclusive right to make, use, and sell a patented article, the assignee or licensee agrees to pay to the assignor or licensor an amount measured by a fixed percentage of the selling price of the article so manufactured and sold or amounts per unit based upon units manufactured or sold, or any other method measured by production, sale or use either by assignee or licensee, or amounts payable periodically over a period generally coterminous with the transferee's use of the patent, such agreements, for income tax purposes, are to be regarded as providing for the payment of royalties taxable as ordinary income.

5. Acquiescence in the decision of the Tax Court of the United States in Edward C. Myers v. Commissioner (6 T. C. 258), as it relates to the issue whether the payments involved therein were taxable as gain from the sale of property, is hereby withdrawn and nonacquiescence substituted.

6. It is held, under authority contained in Section 3791 (b) of the Internal Revenue Code that this ruling shall

not be applied with respect to royalties received from such exclusive license agreements for taxable years beginning prior to June 1, 1950.

7. Inquiries regarding this mimeograph should refer to the number thereof and the symbols IT:EIM. (Signed by Geo. J. Schoeneman, Commissioner, and approved March 20, 1950, by Thomas J. Lynch, Acting Secretary of the Treasury.)

Rev. Rul. 55-58, Section 39.22 (a) (1).

Sale or Exchange of Patents.

(Also Part II, Section 22 (a); Regulations 118, Rev. Rul. 55-58, Section 39.22 (a)-1.)

Many requests have been received for reconsideration of mimeograph 6490, C. B. 1950-1, 9, relating to the treatment of amounts received by inventors from the assignment of a patent, or the exclusive right to make, use and sell a patented article under a license agreement, where such amounts are not subject to the provisions of section 1235 of the Internal Revenue Code of 1954.

Mimeograph 6490, supra, holds that, effective for taxable years beginning after May 31, 1950, payments received by inventors from the assignment of a patent or the license of the exclusive right to make, use and sell a patented article under an agreement whereby payments are measured by production, sale, or use by the transferee, or are payable periodically over a period generally coterminous with the transferee's use of the patent, constitute ordinary income.

A careful study of the problem has been made, taking into consideration, among other things, recent court deci-

sions which support the position taken by the Internal Revenue Service in 1950. See Bloch v. United States, 200 Fed. (2d) 63, certiorari denied, 345 U. S. 935; and Broderick v. Neale, 201 Fed. (2d) 621. Accordingly, it is concluded that Mimeograph 6490, supra, should not be disturbed. In reaching this conclusion, the Revenue Service has considered the decisions in Edward C. Myers v. Commissioner, 6 T. C. 258; Commissioner v. Celanese Corp. of America, 140 Fed. (2d) 339; and Allen v. Werner, 190 Fed. (2d) 840.

Although Section 1235 of the Internal Revenue Code of 1954 specifically provides that, with specified exceptions, such payments received in 1954 and subsequent years will receive capital gains treatment in the hands of the inventor, this provision of the 1954 Code is applicable only to amounts received in taxable years beginning after December 31, 1953, and therefore does not apply to amounts received in taxable years beginning after May 31, 1950, and before January 1, 1954.

Accordingly, except as section 1235 of the Internal Revenue Code of 1954 applies, the Internal Revenue Service will continue to treat as ordinary income the payments received by inventors during taxable years beginning after May 31, 1950, from such transfers.

84th Congress
1st Session

H. R. 6143

In the House of Representatives

May 10, 1955

Mr. Sadlak introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1939 to provide that for taxable years beginning after May 31, 1950, certain amounts received in consideration of the transfer of patent rights shall be considered capital gain regardless of the basis upon which such amounts are paid.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 117 of the Internal Revenue Code of 1939 (relating to capital gains and losses) is hereby amended by adding at the end thereof a new subsection as follows:

"(q) Transfer of Patent Rights.—

"(1) General rule.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfer are—

"(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or

"(B) contingent on the productivity, use, or disposition of the property transferred.

"(2) 'Holder' defined.—For purposes of this subsection, the term 'holder' means—

"(A) any individual whose efforts created such property, or

"(B) any other individual who has acquired his interest in such property in exchange for consideration in money or money's worth paid to such creator prior to actual reduction to practice of the invention covered by the patent, if such individual is neither—

"(i) the employer of such creator, nor

"(ii) related to such creator (within the meaning of paragraph (3)).

"(3) Exceptions.—This subsection shall not apply to any transfer described in paragraph (1)—

"(A) by a nonresident alien individual, or

"(B) between an individual and any related person.

For purposes of this paragraph, the term 'related person' means a person, other than a brother or sister (whether of the whole or half blood), with respect to whom a loss resulting from the transfer would be disallowed under section 24 (b).

"(4) Applicability.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred."

84th Congress) House of Representatives (Report
1st Session) (No. 1607

Income Tax Treatment of Certain Transfers of Patent Rights.

July 30, 1955—Committed to the Committee of the Whole House on the State of the Union and Ordered to Be Printed.

Mr. Sadlak, from the Committee on Ways and Means, Submitted the Following

REPORT.

[To Accompany H. R. 6143]

The Committee on Ways and Means, to whom was referred the bill (H. R. 6143) to amend the Internal Revenue Code of 1939 to provide that for taxable years beginning after May 31, 1950, certain amounts received in consideration of the transfer of patent rights shall be considered capital gain regardless of the basis upon which such amounts are paid, having considered the same, report favorably thereon without amendment and recommended that the bill do pass.

Purpose of the Bill.

This bill amends the Internal Revenue Code of 1939 to apply the special rules providing capital gains treatment for sales or exchanges of patents in Section 1235 of the Internal Reveue Code of 1954 to taxable years beginning after May 31, 1950.

General Statement.

Prior to the enactment of the 1954 Code, there was no special provision relating to the sale or exchange of rights

to a patent. The determination of what constituted a "sale" and what constituted a mere "license" was determined under general principles of law. The Tax Court held that certain agreements where the purchase price is conditioned on the use or profitability of the invention constituted a sale in Edward C. Myers (6 T. C. 258 (1946), Acq. 1946—1 C. B. 3, Non. Acq. 1950—1 C. B. 7). The general principle established by this decision was recently accepted (and the Internal Revenue Service's position rejected) in United States v. Carruthers (219 F. 2d 21 (9th Cir. 1955)). The Government's nonacquiescence in Myers raised a doubt concerning numerous existing and future contracts and was one of the reasons for the enactment of section 1235. This section provides that a transfer of all substantial rights to a patent (or an undivided interest therein) is to be considered as the sale or exchange of a capital asset held for more than 6 months whether or not payments are to be made periodically during the period of the transferee's use of the patent and whether or not the payments are contingent on the productivity, use, or disposition of the property transferred. The relief provided was limited to holders of the patent, defined as the individual whose efforts created the property transferred, i. e., the inventor, or an individual (other than an employer or a relative) who acquired his interest in the property in exchange for money paid to the creator prior to the actual reduction to practice of the invention.

The rule enacted in section 1235 was applicable with respect to amounts received in any taxable year to which the 1954 Code applied, regardless of the year in which the transfer occurred. While this provision removed the previous uncertainty in the law for the inventors and other persons covered by the section, the Internal Revenue Service has announced (Revenue Ruling 1955-58) that it will adhere to its position for years beginning after May 31, 1950, and prior to the effective date of the 1954 Code.

Thus payments received from such transactions in these years would continue to be treated as ordinary income by the Internal Revenue Service rather than as capital gain to the transferor.

This bill adds a new subsection to section 117 of the 1939 Code which is substantially the same as section 1235 of the 1954 Code. This subsection is to apply to payments made, and amounts received, in years to which the 1939 Code applies, beginning after May 31, 1950.

When section 1235 was originally enacted, it was stated in the committee report that there was no intention of affecting the operation of existing law in those areas outside the scope of the section, and no inference was to be drawn from section 1235 as to what constituted a "sale or exchange" in the case of transfers not within the scope of the section. Similarly, no inference is to be drawn from the enactment of this bill.

Your committee has reported this bill unanimously.

Changes in Existing Law.—Omitted.

APPENDIX B.

Memorandum Opinion—District Court.

[Caption Omitted]

Memorandum Opinion.

Plaintiffs have sued to recover certain portions of their income taxes paid for the years 1951, 1952 and 1953. In those years plaintiff George R. Dempster was paid certain sums by Dempster Brothers, Inc., a corporation, as part of the consideration for his transfer to the corporation of all of his rights in certain patents. Under the then existing regulations of the Commissioner of Internal Revenue, the payments received by Mr. Dempster were treated as ordinary income. However, by act of Congress approved June 29, 1956, such payments were declared otherwise, the transfer of patent rights being therein treated as the sale of a capital asset, which would require that the consideration be treated as a capital gain rather than as ordinary income. Public Law 629, 70 Stat. 404.

Plaintiffs have moved for summary judgment in their favor to the effect that by reason of Public Law 629, 70 Stat. 404, consideration paid for the patent transfer, treated as ordinary income, has had its status changed retroactively to that of capital gain, and that the resultant tax advantage entitles plaintiffs to refund of the sums represented by this advantage. Defendant has moved for dismissal of the complaint as it applies to refunds for 1951 and 1952 taxes, on the ground that the claims for refunds for those tax years were not filed within three years from the time the income tax returns were filed, reliance being placed on Internal Revenue Code, 1954, sec. 6511; 1939 Code sec. 322 (b) (1).

Presented by the motions is examination of public law 629 and discovery of the limitation period which should be invoked in reference to said law.

Public law 629 is styled "An Act to amend the Internal Revenue Codes of 1939 and 1954, and for other purposes." It contains the following:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section 117 of the Internal Revenue Code of 1939 (relating to capital gains and losses) is hereby amended by adding at the end thereof a new subsection as follows:
>
> "(c) Transfer of Patents Rights.—
>
> "(1) General Rule.—A transfer (other than by gift, inheritance, or devise) of property consisting of all substantial rights to a patent, or an undivided interest therein which includes a part of all such rights, by any holder shall be considered the sale or exchange of a capital asset held for more than 6 months, regardless of whether or not payments in consideration of such transfers are—
>
> "(A) payable periodically over a period generally coterminous with the transferee's use of the patent, or
>
> "(B) contingent on the productivity, use or disposition of the property transferred.
>
> " • • •
>
> "(4) Applicability.—This subsection shall apply with respect to any amount received, or payment made, pursuant to a transfer described in paragraph (1) in any taxable year beginning after May 31, 1950, regardless of the taxable year in which such transfer occurred."

Public law 629 contains four other sections, all of which relate to other subject matter. Section 1, from which the

above quotation is taken, makes no reference to a limitation period.

Section 2, however, closes with the following sentence: "Notwithstanding the preceding sentence, no claim for credit or refund of any overpayment resulting from the amendment made by this section shall be allowed or made after the period of limitation applicable to such overpayment, except that such period shall not expire before the expiration of one year after the date of the enactment of this Act."

The last paragraph of sec. 3 of public law 629 contains the following:

> "(b) The amendment made by this section to section 115 of the Internal Revenue Code of 1939 shall be effective as if it were a part of such section on the date of enactment of the Internal Revenue Code of 1939, * * *"

Section 5 closes with the following:

> "(b) The amendment made by this section shall apply with respect to taxable years ending after December 31, 1955, but only in the case of sales and exchanges of livestock after December 31, 1955."

The "applicability" provisions of secs. 2, 3 and 5, as well as of sec. 4, seem somewhat more understandable than that of sec. 1, relating to transfer of patent rights, but all of them, noticeably that of sec. 3, clearly indicate the retroactive nature of the amendments contained in public law 629, including the applicability provision of sec. 1.

A limitation provision appears only in sec. 2, herewith again quoted (paragraph b): "Notwithstanding the preceding sentence, no claim for credit or refund of any overpayment resulting from the amendment made by this sec-

tion shall be allowed or made after the period of limitation applicable to such overpayment, except that such period shall not expire before the expiration of one year after the date of the enactment of this Act." This quoted provision indicates two things: First, that credits or refunds shall be subject to the limitation period "applicable" to them; second, that such period is assured a life extending one year beyond the date of the enactment of public law 629.

As sec. 1 has no extension provision and makes no reference, general or otherwise, to applicable limitation provisions, it leaves as an open problem discovery of the limitation period which controls suits brought under sec. 1. In its motion for dismissal, the Government relies on sec. 6511 of the 1954 Internal Revenue Code, sec. 322 (b) (1), 1939 Code. The pertinent provision of sec. 6511 is the following:

> "(a) Period of limitation on filing claim.—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was required to be filed (determined without regard to any extension of time) or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax is paid."

Sec. 6511 provides different periods of limitation for different claims, including a seven-year period with respect to bad debts and worthless securities, a different period for operating loss carrybacks, and others. The inference

to be drawn is, that each limitation attaches only to the specific subject matter to which its language relates it.

Re-examination of sec. 6511 (a) discloses that it relates to overpayments—claims "for credit or refund of an overpayment of any tax * * *" This presents the crucial point in the case. Whether retroactivity, at least implicit in public law 629, operates to put aside sec. 6511 (a) may not need to be decided, depending on whether the limitation period of sec. 6511(a) is the period applicable to the claim of the plaintiffs. Sec. 322, read in such parts as relate to credit or refund for overpayment, does not change the problem.

"Overpayment" is defined by sec. 6401 of the Internal Revenue Code of 1954 [Sec. 3770 (a) (1) (2), 1939 Code], as follows:

> "(a) Assessment and collection after limitation period.—The term 'overpayment' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto."

Subchapter B of Chapter 76, 1954 Code, is entitled "Proceedings by Taxpayers." Included in the subchapter is sec. 7422 [Sec. 3772 (a), (1), 1939 Code], which contains the following:

> "(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according

to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

Subchapter D of Chapter 66, 1954 Code, relating to limitations and judicial proceedings includes sec. 6532 [Sec. 3772 (a) (2), 1939 Code], which contains the following:

"(a) Suits by taxpayers for refund.—

"(1) General rule.—No suit or proceeding under section 7422 (a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates."

The matters contained in quotations above contain references to "overpayments," taxes "erroneously or illegally assessed or collected," and taxes "alleged to have been excessive or in any manner wrongfully collected." The quoted language also sets out the limitations periods which pertain to the taxes in this paragraph described.

In the case before the court, what plaintiffs are suing for does not fall within any of the described classes. When the tax based upon consideration for transfer of patent rights was paid, it was not an overpayment. Nor was it an illegal tax. Nor was it a tax illegally or wrongfully assessed or collected. As the law stood at the time of its payment, it was a legal tax and the amount paid was the correct amount. This action was brought to recover money accruing as a right to the taxpayers by virtue of an act of Con-

gress which changed the nature of money received by the taxpayer from that of ordinary income to that of capital gain. None of the sections above presented, nor any section found in the Internal Revenue Code, contains a limitation period which fits this situation. See, Thacher v. U. S., 149 Fed. 902.

Accordingly, the case must, and does, fall within the general limitation period which controls as to suits against the United States. That is the period contained in 28 U. S. C. 2401 (a), which is as follows:

> "Sec. 2401. Time for commencing action against the United States. (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Plaintiffs' right of action accrued June 29, 1956, when public law 629 was approved. Their action was commenced August 23, 1957, well within the six-year period. See, also, 28 U. S. C. 1346.

From the foregoing it results that the Government's motion to dismiss must be overruled and the motion of plaintiffs for summary judgment in their favor must be sustained.

Let the appropriate order be prepared.

Robt. L. Taylor,
Judge.

No. 13,700

United States Court of Appeals
For the Sixth Circuit

United States of America,
Appellant,

v.

George R. Dempster and
Frances S. Dempster,
Appellees.

Appeal from the United States District Court for the Eastern District of Tennessee.

Decided April 29, 1959

Before Martin, Chief Judge, Boyd and Choate, District Judges.

Per Curiam. This is an appeal from a judgment of the District Court for the Eastern District of Tennessee, Northern Division, granting taxpayers' claims for refund of 1951 and 1952 federal income taxes. In these years the taxpayer husband received certain sums as part consideration for the transfer of all his rights in certain patents. On returns filed for each of those years, taxpayers reported the royalties so received as ordinary income and paid the tax due on that basis.

On September 11, 1956, taxpayers filed claims for refund for the years involved alleging overpayments of tax for those years by virtue of an Act of Congress (Act of June 29, 1956, c. 464, 70 Stat. 404) which amended Section 117 of the Internal Revenue Code of 1939, by adding

thereto subsection (q). This subsection provides that (for the taxable years involved here) income received in consideration for a transfer of patent rights is to be treated as a long-term capital gain. The claims for refund were denied on July 9, 1957, and the taxpayers instituted this suit for recovery of the taxes.

The question for consideration here is whether Section 117 (q) of the Internal Revenue Code of 1939 created a claim against the United States taking the suit out of the three year statute (Sec. 322 (b) (1) I. R. C. 1939 and Sec. 7422 (a) I. R. C. 1954) governing overpayment of taxes and entitling the taxpayers to the benefit of the general six year statute of limitations provided in 28 U. S. C., Section 2401 (a), within which to institute suit for recovery of federal income taxes erroneously paid.

Before this case was presented for review by this court the opinion of the District Court (162 Fed. Supp. 585) was considered by the Court of Appeals for the Fifth Circuit in a case involving both the same factual situation and the same legal question as presented herein. Chief Judge Hutcheson of the court wrote the opinion (Kenneth J. Tobin and Marguerite R. Tobin v. United States of America, decided March 25, 1959) in which he stated, and correctly so we think, that Section 117 (q) of the Internal Revenue Code of 1939 did not establish but merely confirmed the already existing right to seek a timely refund and that, under the facts and controlling law, there is no basis for taxpayers' theory that the ordinary statute limiting claims and suits for tax refunds is not applicable.

On the authority of the opinion of the Court of Appeals of the Fifth Circuit in the Tobin case, supra, and for reasons stated therein the judgment of the District Court is reversed and the complaint is hereby dismissed.

Kenneth J. Tobin and Marguerite R. Tobin,
Appellants,

v.

United States of America,
Appellee.

No. 7474.

United States Court of Appeals
Fifth Circuit.

March 25, 1959.

Before Hutcheson, Chief Judge, and Tuttle and Jones, Circuit Judges.

Hutcheson, Chief Judge.

Coming here on a very small record, this appeal is from a judgment dismissing on the ground that the three year statute of limitations, Sec. 322(b) (1) I. R. C. 1939, 26 U. S. C. A. § 322(b) (1), had barred it, taxpayer's suit for the comparatively small refund of $838.24, overpaid for the year 1951 in connection with receipts from a patent, though it is in quite small compass, it presents questions of more than ordinary interest which have been briefed and argued with care and earnestness. One of these is whether Section 117(q) 1939 I. R. C. added June 29, 1956, 26 U. S. C. A. § 117(q), and dealing with transfers of patents, created a claim against the United States taking the suit out of the three year statute governing overpayment of taxes and entitling taxpayer to the benefit of the general six year statute of limitations. The other, in the alternative, is whether, if this is answered in the negative, the section impliedly extended the period of limitation for filing claims and instituting suits for refunds prescribed in Sec. 322(b) (1) I. R. C. 1939 and Sec. 7422(a) I. R. C. 1954, 26 U. S. C. A. § 7422(a).

On their part, taxpayers, opposing to the opinion of the district judge in this case the contrary opinion of the district judge of the Eastern District of Tennessee in Dempster v. United States, D. C., 162 F. Supp. 585, an opinion presented to and rejected by the trial court in this case, and commending the case to our favorable consideration, support it by arguments of their own generally to the same effect and, as giving sanction to this view, by citing Philbrick v. Commissioner, 27 T. C. 346, and Rollman v. Commissioner, 4 Cir., 244 F. 2d 634, cases which, as we read them, do not support it. In the alternative, and citing and quoting in support from Thomas v. Mercantile National Bank, 5 Cir., 204 F. 2d 943; United States v. Dubuque Packing Co., 8 Cir., 233 F. 2d 453, and Hollander v. United States, 2 Cir., 248 F. 2d 247, taxpayers, assuming that the amendment of the statute was not declaratory but in derogation of the law of the cases, place their reliance upon the argument that the claimed right to refund did not exist before but was created by the amendatory statute and that it must be held therefore that the right did not accrue and limitation did not, indeed, could not, begin to run until the passage of the act.

On its part the United States, taking flat issue with taxpayers' claim that the amendatory section created the right to refund, points to Myers v. Commissioner, 6 T. C. 258; Kronner v. United States, Ct. Cl., 110 F. Supp. 730; Commissioner of Internal Revenue v. Celanese Corp., 78 U. S. App. D. C. 292, 140 F. 2d 339, and Commissioner of Internal Revenue v. Hopkinson, 2 Cir., 126 F. 2d 406, to which we may add from this court, Allen v. Werner, 5 Cir., 190 F. 2d 840, all pre-statute cases, and the recent case from this court of Bannister v. United States, 262 F. 2d 175, Cf. United States v. Carruthers, 9 Cir., 219 F. 2d 21 and Rollman v. Commissioner, 4 Cir., 244 F. 2d 634. So pointing, it declares, correctly we think, that the statute in question did not establish, it merely confirmed, the

already existing right to seek a timely refund and that under the facts and the controlling law, there is no basis for taxpayer's theory that the ordinary statute limiting claims and suits for tax refunds is not applicable.

Urging upon us that there is no basis in Sec. 322(a) (1) I. R. C. 1939 for the gloss which the district judge in the Dempster case put on the word "overpayment," the United States points out that in Jones v. Liberty Glass Co., 332 U. S. 524, 68 S. Ct. 229, 92 L. Ed. 142, the Supreme Court reviewed the legislative history of this section and, holding that it dealt broadly with income taxes erroneously or illegally assessed and that all income tax refund claims must be filed within three years, rejected the contention that the word "overpayment" should be narrowly or restrictively construed.

Turning to the taxpayers' second contention, that the invoked statute impliedly extended the period of limitation for filing claims by making limitation to commence to run from the passage of the Act, the United States, recognizing that there is a split in the authorities on the general point, insists that the view espoused by the majority in the Hollander case is not the correct one. Without ourselves undertaking to determine the correctness of taxpayers' view or of the authorities cited in support of it, based on the taxpayers' assumption that the statute created their right, we think the theory and the authorities have no application here for the reason implicit in the other cases and explicit in Bannister's case. This is that the invoked statute did not create the right, it merely came to the aid of the taxpayer in rejecting as unwarranted and bringing under statutory control the commissioner's vacillating and arbitrary action in now accepting and now rejecting in regard to patents the view announced in the cases. What we said there, though not said in this immediate connection, is, we think, quite appropriate here.

There, after pointing out that the statute did not create the right but was merely declaratory and in support of the right declared in the case law, the court said [262 F. 2d 177]:

"While the district judge, reciting that the realities of the situation must control did cite many of cases relied on by appellant, and did declare that the statute should receive a liberal interpretation, it seems to us that, because of the confusion brought on by the Treasury's action, the court below fell into its error. This was that in endeavoring to find in the words of the statute alone the basis for appellants' claim, whereas its real basis was in the case law, of which the statute was more or less declaratory, the court was led into a narrow, instead of a broad, construction, and thereby to deny to the undisputed facts in this case the results which, under the controlling decisions, followed from them."

The judgment was right. It is affirmed.

Judgment.

(Filed April 29, 1959.)

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the complaint dismissed.

Stewart P. Verckler, as Executor of the Estate of Margaret Stewart Verckler, v. The United States.

U. S. Court of Claims,
Docket No. 361-57, 3/4/59.

170 F. Supp. 802.

Laramore, Judge, delivered the opinion of the court:

This is a suit for the refund of $20,863.74 in estate tax paid by the plaintiff as executor of the estate of Margaret Stewart Verckler. Claim is made under the provisions of Public Law 417, 84th Congress, 2d Session, 70 Stat. 26, approved February 20, 1956, retroactively amending the Internal Revenue Code of 1939 by adding new section 814, which provided in pertinent part as follows:

> * * * If the executor so elects, the tax imposed by sections 810 and 935 in the case of a decedent (but only if the decedent was a citizen or resident of the United States at the time of his death) dying after December 31, 1951, shall be credited with all or a part of the amount of the Federal estate tax paid with respect to the transfer of property * * * to the decedent by or from a person * * * who was the spouse of the decedent at the time of such person's death and who died within two years before the decedent's death * * *.

The remaining portions of the act deal with the method of computing the credit and a provision that no interest shall be allowed in case of refund resulting from relief under the act.

The uncontroverted facts in this case show that the decedent Margaret Stewart Verckler died on February 25, 1952, which was within two years of the death of her lawful spouse. On May 21, 1953, an estate tax return was filed together with payment of $175,858.74 as shown due by that return. On April 23, 1956, a deficiency assessment

was made against the estate in the amount of $2,194.65 together with interest. This deficiency assessment was paid in full on April 27, 1956. On September 19, 1956, plaintiff filed a claim for refund of estate taxes in the amount of $23,058.39 alleging entitlement to the provisions of P. L. 417, supra, because that sum represented estate tax paid on property previously taxed to the estate of decedent's husband. The Commissioner of Internal Revenue allowed plaintiff's claim to the extent of $2,194.65 which was equal to the deficiency payment, less interest, made on April 27, 1956, but denied refund for the remaining $20,863.74 for which plaintiff has instituted this suit. Both parties have moved the court for summary judgment stating that there is no issue as to any material fact and that they are entitled to judgment as a matter of law.

The Government's sole defense to this action is that the claim is now barred by the applicable statute of limitations. This arises in the following manner:

Section 7422 (a) of the Internal Revenue Code of 1954 provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

Section 910 of the Internal Revenue Code of 1939 under which this claim arises provides that:

> All claims for the refunding of the tax imposed by this subchapter alleged to have been erroneously or illegally assessed or collected must be presented to the

> Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.[1]

Defendant contends, and the facts clearly show, that with respect to the $20,863.74, this amount was paid to the Commissioner more than three years prior to making a claim for refund on September 19, 1956. This defendant says is a complete bar to any recovery because under the provisions of section 3774 of the 1939 Code the Commissioner is barred from making any refund after the period for filing claim has expired. Defendant then cites many cases holding for the proposition that timely filing of a claim for a refund of tax is a procedural prerequisite to the bringing of a lawsuit. We are in complete agreement with the defendant, and the cases it has cited, and do not feel that any further discussion of this point is either necessary or warranted. However, this does not dispose of the instant suit.

The 1939 Code under which plaintiff's original estate tax liability arose was retroactively amended by P. L. 417 on February 20, 1956, in order that the estates of persons dying subsequent to December 31, 1951, would receive substantially the same tax treatment afforded estates by section 2013 of the Internal Revenue Code of 1954. The amendment as passed by Congress contained no provision as to a time limit for filing claims thereunder. Defendant says that this is significant in itself and can only mean that Congress intended that claimants should be bound by the law and regulations promulgated under the 1939 Code

[1] Treasury Regulations 105, § 81.96, follows § 910 of the 1939 Code in requiring that claim must be made within three years next after payment of the tax.

without reference to the effect of the amendment. The net result of such a construction is that sections 910 of the 1939 Code and 7422(a) of the 1954 Code would deny benefits of P. L. 417 to those estates which settled their tax bill more than three years prior to February 20, 1956.

However, it is the opinion of this court that neither section 910 of the 1939 Code nor section 7422(a) of the 1954 Code, supra, should be so construed as to create a legal bar to the intended relief of the statute. Prior to the passage of the amending act, the action of the Commissioner in assessing and collecting estate taxes upon property previously taxed in the estate of decedent's spouse was both correct and legal. Therefore, no claim for refund could possibly be filed upon the grounds that there had been an erroneous or illegal collection of tax. In short, no cause of action existed. Certainly no authority exists for filing contingent claims based upon the possible action of Congress in passing remedial legislation. Not until February 20, 1956, when P. L. 417 came into effect, did plaintiff have a right to claim and receive refund of the tax. This was not a claim for taxes previously erroneously or illegally collected, but an election to receive the benefits of a relief statute.[2]

The result contended for by defendant would be harsh indeed because in order to qualify under its theory plaintiff's claim would have had to have been on file by May 21, 1956, just over three months from the enactment of P. L. 417. This seems to us an arbitrary and unwarranted construction of a relief statute.

It is commonly held among the courts that statutes intended to relieve persons of hardships should be construed in favor of those who are the intended beneficiaries. Hollander v. United States, 248 Fed. (2d) 247 [57-2 USTC

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[2] That P. L. 417 was intended as a relief act is clearly borne out by S. Rep. No. 1402, 84th Cong., 2d Sess.

¶ 11,720]. To require the filing of a claim for refund within three years from the date of payment of the tax, for which P. L. 417 provides relief, would in some cases completely negate any and all benefits provided by that act. Such would have been the case if this plaintiff had paid its tax three months and one day earlier. This would necessarily reward taxpayers who delay payment of their estate tax while at the same time denying similar treatment to those who meet their responsibilities with celerity. Such a consequence shocks the conscience and clearly does violence to the intended purpose of P. L. 417 which was to make its relief available with respect to estates of all decedents dying after December 31, 1951, and before August 16, 1954. H. R. Rep. No. 1495, 84th Cong., 2d Sess.

What then is the proper limitation period applicable to claims made under P. L. 417? In Siegel et al. v. United States, 84 C. Cls. 551 [37-1 USTC ¶ 9207], this court had opportunity to decide a somewhat similar question. In that case Congress had in 1921 passed a law, section 403 of the Revenue Act of 1921, providing that property which had been subjected to an estate tax within the preceding five years should not again be taxed in an estate. The act further provided that where property had already been taxed twice within five years by reason of its inclusion in the gross estate of a decedent, refund should be made. The act was made retroactive to September 8, 1916, and decreed that:

> In the case of any estate in respect to which the tax has been paid, if necessary to allow the benefit of the deduction * * * the tax shall be determined and any excess of tax paid shall be refunded to the executor.

In the Siegel case the plaintiffs did not file a claim for refund under the relief act until more than 11 years after final settlement of the estate involved. The Commissioner

denied the claim and within two years suit was brought in this court.

The court held that in order for the taxpayer to obtain a refund it was not necessary to file a claim with the Commissioner as required by section 3228 of the Revised Statutes. (Section 3228 of the Revised Statutes is substantially the same as section 910 of the Internal Revenue Code of 1939.) However, the court did not hold that section 3226 of the Revised Statutes requiring that suit for recovery of any tax alleged to have been illegally or erroneously collected be brought within two years after a disallowance by the Commissioner was applicable.[3]

The court reasoned that the retroactive provision of the act which specifically directed the Commissioner to refund the tax took the place of a claim for refund required by Rev. Stat. 3228 and since the suit was instituted within two years of rejection as required by Rev. Stat. 3226 plaintiff was entitled to judgment. The court further held that the retroactive provisions of the act made what previously had been correctly assessed taxes illegal and erroneous with the meaning of Rev. Stat. 3226.

The act which we are called upon to interpret contains a retroactive provision which has the same effect of making the prior legal exactment of taxes erroneous and illegal. However, P. L. 417, does not, as in Siegel, contain a command to the Commissioner that he make refund, but instead requires that the executor elect to come within its provisions. By election we think Congress could only have meant the filing of a claim for refund with the Commissioner in order that he may be afforded an opportunity to audit returns and redetermine the tax. Thus section

[3] In the Siegel case, Government counsel argued that the general limitation period of six years applicable to suits in this court applied and that plaintiffs' cause of action first accrued upon passage of the act on November 23, 1921.

7422(a) of the Code should operate as requiring that a claim for refund must be filed prior to the institution of legal proceedings. In this connection section 910 of the 1939 Code should also be held to require that a claim be filed within three years from the payment of the illegal or erroneous tax. Since the payment here in question was not illegal, erroneous or excessive until the approval of P. L. 417, we construe that act as creating a constructive payment as of February 20, 1956, and the three year limitation period of section 910 did not begin to run until that time.[4]

In summary, P. L. 417 created a cause of action based upon the payment of an illegal and erroneous estate tax; the payment constructively arose as of the date the law was approved; section 910 of the 1939 Code became operative as a limitation period for filing a claim as of that date and not as of the date the previously legally assessed tax was paid.

Plaintiff filed his claim for refund within three years of February 20, 1956, which claim has been rejected and timely suit brought. Having complied with the provisions of law applicable to the refund of estate tax, plaintiff is entitled to recover $20,863.74, without interest,[5] and judgment will be entered to that effect.

It is so ordered.

Madden, Judge; Whitaker, Judge; and Jones, Chief Judge, concur.

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[4] In Dempster v. United States, 162 Fed. Supp. 585 [58-1 USTC ¶ 9501], the U. S. District Court, E. D. Tenn., N. D., held in a somewhat similar case that the general limitation period which controls suits against the United States was applicable and that the cause of action first accrued when the act there in question was approved. Cf. Westinghouse Electric Corp. v. United States, 135 C. Cls. 119 [56-1 USTC ¶ 9494].

[5] Section 2 of P. L. 417 provides that "No interest shall be allowed or paid on any overpayment resulting from the amendment made by the first section of the Act."